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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 38

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER, FERRY, INC.,

Petitioner,

vs.

C. GORDON ANDERSON, TRUSTEE,

Respondent.

PETITION OF RESPONDENT FOR REHEARING

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The Respondent, C. GORDON ANDERSON, TRUSTEE, respectfully petitions the court for a rehearing of the issues determined in the opinion of the court entered herein on March 25, 1968.

The opinion of the court does not deal with any substantial Federal question of statutory construction but is concerned only with the court's re-evaluation of a large volume of evidence and circumstances bearing on whether two large claims should have been compromised and whether the debtor was insolvent. In analyzing the evi-

dence to reach the conclusion that the trial judge had decided the issues erroneously, certain material factors were overlooked and certain evidence was apparently not considered.

THE COMPROMISES OF THE CAPLAN MORTGAGE AND MERRILL-STEVENS CLAIMS

1. These compromises were set aside without the court giving any weight to the fact that they had the complete blessing of the only real parties in interest—the creditors. It was a committee representing the unsecured creditors who first proposed the compromises. No common creditor objected to the compromises, and the creditors on two occasions accepted by overwhelming vote the plan of reorganization in which the compromises were an integral part. The opinion of the court brushes this argument aside (page 18) with the statement that there had been inadequate investigation of objections to the claims and insufficient explanation given of the basis for approving the compromises. Entirely overlooked is the fact that **all creditors concerned were represented by counsel** who, it must be assumed, were aware of the well documented objections to the claims and were competent to advise their clients with respect to their merits and whether the compromises were fair and equitable under all the circumstances involved. Compromises agreed upon by all parties concerned, especially when represented by counsel, should be approved. The ends of justice are served when protracted litigation can be brought to an end by compromise, regardless of the possible uncertain merits of the contentions of the parties.

2. The court incorrectly **assumed** that by litigating the objections to the Caplan mortgage and Merrill-Stevens claims the outcome might contribute to a finding that the debtor was solvent and that therefore the stockholders would be entitled to participate in the reorganized company. The opinion stated (page 36) that "it is possible . . . the company will be found not to be insolvent," but we submit the record shows clearly that if the two claims were disallowed **in toto** the debtor would remain insolvent. We will discuss this in detail below under our argument on the insolvency issue.

THE INSOLVENCY ISSUE

1. The district court's finding of insolvency was set aside because the lower court did not have before it evidence and testimony relating to the future problems and prospects of the company. We respectfully submit that this assumption is not accurate and is not sustained by the record.

The two expert witnesses at the first valuation hearings held in 1962 gave consideration to future problems and prospects of TMT in making their estimates of going concern value. The Trustee's witness, Heusen, considered among other factors the problems of vessel replacement, additional capital to provide such replacement, the dwindling tax loss benefits, and future competition. (II 127-129)* He took those matters into account in arriving at a present going concern value based on the accurate records of past operations.

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*Refers to mimeographed transcript record of appeals. II is 5th Circuit record in Case #19,996. III is 5th Circuit record in Case #22,652.

The witness for the Stockholders Committee, Morgan, took into account in his valuation the expanding Puerto Rican economy, possible increase in TMT's share of the growing market, and elimination of reorganization expenses. (II 240-250) Considering these factors, he arrived at a going concern value of $4,519,500. (II 248)

The second valuation hearing held in January 1965, (III 120-212) includes lengthy discussions of existing factors affecting TMT's Puerto Rican trade which would necessarily have a direct bearing on future earnings of the company. These include the actions of competitors, the rate proceedings before the Maritime Commission, the need to replace the existing vessels and new financing required for such replacement. It is apparent from the testimony at this hearing that the Trustee presented to the court **all available information** on the future prospects of the company.

It is true, as the opinion of the court points out (page 31) that no projection of future revenues, expenses or income was prepared but such failure was thoroughly and adequately explained. The business manager for the Trustee was asked if he could estimate what TMT's earnings might be after reorganization. (III 142) His reply was that you could not tell at the time what vessels would be operating and, considering other uncertain factors, such an estimate would be most difficult and very indefinite. He explained that the cost of new vessels and their method of financing were matters that the Trustee had not gone into thoroughly because they were considered problems to be solved after reorganization by the new owners. (III -145)

It was on the basis of such testimony that the district court refused to require estimates to be made of future income which would be speculative and unreliable, and decided that the most reliable basis for determining going concern value were projections based on present conditions and past experience. Such determination by the trial judge is entirely consistent with the opinion of this court in **Consolidated Rock Products Co. v. DuBois**, 312 U.S. 510 since the past earnings record was found under the circumstances to be more reliable than estimates based on uncertain future conditions.

In summary, the district court had before it a good picture of the future problems and prospects of TMT but they were too uncertain, standing alone, to form the basis for reliable estimates of future earnings. There is nothing in the record to indicate that reliable and accurate future projections of earnings could be made in TMT's situation.

2. There is no basis in the record for the court's assumption that further valuation hearings could possibly result in a finding that TMT is solvent. In the absence of such possibility, the use of an erroneous method of arriving at TMT's going concern value is harmless error.

Claims against the debtor totaled $5,477,370.05. The strict priority rule requires payment of interest on claims before stockholders have any equity, as we point out on page 50 of our brief on the merits. The reorganization proceedings began in June 1957, and more than ten years interest (more than 60% at a 6% rate) will have to be added to the creditors' equity before stockholders can be considered. This would add more than three million dollars to the claims. There is nothing in the record to indicate

that a re-valuation of the debtor could possibly produce a going concern value that would exceed the amount of the claims with interest included. The most optimistic figure in the record of going concern value, that of the witness Morgan for the Stockholders Committee, is $4,519,500 and, of course, falls far short of the full amount of claims when interest on them is considered.

If the full amount of the Caplan mortgage and Merrill-Stevens claims, which total about $1,958,000 is eliminated from consideration, it is apparent that the debtor would remain insolvent as the district judge found.

We therefore respectfully suggest that the court has not fully considered that a finding of solvency under the facts and circumstances here is so remote and entirely unlikely that any error in the method of arriving at the debtor's going concern value is a harmless one.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a rehearing should be granted and the orders and opinions of the lower courts affirmed.

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Attorneys for the Respondent

Dated: April 18, 1968

CERTIFICATE OF COUNSEL

The undersigned, as attorney for the respondent herein, hereby certifies that the foregoing PETITION OF RESPONDENT FOR REHEARING, is presented to the court in good faith and not for the purpose of delay.

Dated this 18th day of April, 1968.

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